KHOO KAY HOE

v.

CHOR PHAIK HAR & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: P-03-7-1996 & P-03-8-1996]
20 MAY 1999

BANKRUPTCY: *Notice - Validity - Bankruptcy notice founded on allocatur issued pursuant to a final order for costs - Whether bankruptcy notice valid and not defective - Whether allocatur merged with court order for costs - Whether act of bankruptcy committed - Bankruptcy Act 1967, ss. 3(1)(i), 131 - Bankruptcy Rules 1969, r. 18*

CIVIL PROCEDURE: *Costs - Final order for costs - Allocatur issued in respect of costs - Whether bankruptcy proceedings could be founded on an allocatur - Whether allocatur constituted part of order for costs - Whether merged with order for costs*

The appellants in these appeals were ordered to pay costs to the respondent in respect of an action in High Court, Penang, vide an order of that court dated 7 September 1991. As it were, the said costs were taxed and an allocatur was issued to that effect. Following the appellants' failure to pay the costs, and based on the allocatur aforesaid, the respondent commenced bankruptcy proceedings against the appellants, whereupon both appellants were adjudged bankrupts. The appellants had appealed against the receiving and adjudication orders made against them, but were not successful at that.

At the hearing herein, the appellants argued that the receiving and adjudication orders were invalid as the bankruptcy notices were founded on an allocatur, and not on any judgment or order of court. The allocatur, according to the appellants, was not an order of court nor a judgment, and that being no bankruptcy proceedings could lawfully be commenced pursuant thereto. The appellants also contended that no act of bankruptcy had been committed by them, bearing in mind the provisions of s. 3(1) of the the Bankruptcy Act, 1967 ('the Act'). For their part, the respondent retorted that even if the bankruptcy notices herein were defective, such defects were curable under s. 131 of the Act. The main issue that arose was whether bankruptcy proceedings could properly be commenced pursuant to an allocatur.

Held:
Per Abdul Malek Ahmad JCA

[1] The court order of 7 September 1991 would be rendered meaningless, and the respondent deprived of any recourse for the recovery of the costs against the appellants if this court were to uphold the appellants' contention that bankruptcy proceedings cannot be based on an allocatur.

[2] The words "or sum ordered to be paid" in para. (i) of sub-s. (1) of s. 3 of the Act, which appears after the words 'judgment debt" are clearly qualified by the phrase "in accordance with the terms of the judgment or order" in that section. The High Court, in the circumstances, was correct when it held that the allocatur constituted part of, and should be read in conjunction with the court order of 7 September 1991. Consequently, the respondent was entitled to institute bankruptcy proceedings against the appellants based on the allocatur. It follows that the appellants were liable to pay the respondent the costs in the said allocatur.

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu-perayu dalam kes-kes rayuan di sini telah diperintahkan membayar kos kepada responden berhubung suatu tindakan di Mahkamah Tinggi, Pulau Pinang, berikutan satu perintah mahkamah tersebut bertarikh 7 September 1991. Sepertimana halnya, kos tersebut telah ditetapkan dan satu alokatur berkaitan dengannya telah dikeluarkan. Berikutan kegagalan perayu-perayu membayar kos tersebut, dan berdasarkan kepada alokatur di atas, responden memulakan satu tindakan kebankrapan terhadap perayu-perayu, yang berakibat kedua-dua perayu diisytiharkan bankrap. Perayu-perayu telah merayu terhadap perintah penghakiman dan penerimaan terhadap mereka, tetapi telah ditolak.

Di perbicaraan semasa ini, perayu-perayu berhujah bahawa perintah-perintah penghakiman dan penerimaan berkenaan adalah tidak sah kerana notis kebankarapan telah didasarkan atas alokatur, dan bukannya kepada mana-mana perintah mahkamah atau penghakiman. Mengikut perayu-perayu, alokatur bukan satu perintah mahkamah atau penghakiman, dan oleh itu ia tidak boleh menjadi asas bagi menggerakkan prosiding kebankrapan. Perayu-perayu juga berhujah bahawa mereka tidak melakukan apa-apa perbuatan kebankrapan, mengambilkira peruntukan s. 3(1) Akta Kebankrapan 1967 ('Akta'). Sebagai membalas hujah, responden menyatakan bahawa walaupun notis kebankrapan yang diisukan terhadap perayu-perayu cacat, kecacatan sedemikian boleh dibetulkan di bawah s. 131 Akta. Isu penting yang berbangkit ialah samada prosiding kebankrapan boleh dimulakan dengan teraturnya berasaskan suatu alokatur.

Diputuskan:
Oleh Abdul Malek Ahmad HMR

[1] Perintah mahkamah bertarikh 7 September 1991 akan menjadi tidak bermakna, dan responden juga akan dinafikan dari mendapat kosnya terhadap perayu-perayu sekiranya mahkamah membenarkan hujah perayu-perayu bahawa prosiding kebankrapan tidak boleh diasaskan kepada alokatur.

[2] Perkataan "atau sebahagian daripada jumlah yang diperintahkan dibayar" dalam perenggan (i) subs. (1) kepada s. 3 Akta, yang diletakkan selepas perkataan "penghutang penghakiman", jelas telah dihadkan oleh ungkapan "mengikut terma-terma penghakiman dan perintah" dalam seksyen tersebut. Mahkamah Tinggi, dengan hal yang demikian, adalah betul bilamana memutuskan bahawa alokatur merupakan sebahagian daripada, atau patut dibaca bersekali dengan perintah mahkamah bertarikh 7 September 1991. Oleh sebab itu, responden adalah berhak untuk memulakan prosiding kebankrapan terhadap perayu-perayu berdasarkan alokatur. Ianya mengikut bahawa perayu-perayu bertanggungjawab membayar responden kos yang dinyatakan di dalam alokatur.

[Rayuan-rayuan ditolak.]

Case(s) referred to:
Cartwright & Anor v. Barker [1975] 2 All ER 970 ***(dist)***
Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 ***(refd)***
Re Haroun Al-Rashid Mohd Yusof, ex p Daya Leasing Sdn Bhd [1996] 2 CLJ 516 ***(refd)***
Re Wheeler (a debtor) [1982] 1 All ER 345 ***(refd)***
Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 MLJ 233 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 131
Bankruptcy Rules 1969, r. 18

Other source(s) referred to:
Bankruptcy Handbook, MLJ Handbook Series, p II, 63

For the appellant - Dato' Ghazi Ishak (Tan Beng Hong & Lim Ping Kok with him); M/s Tan Beng Hong & Co
For the respondents - N Chandran (Toh Lee Hong & S Ramesh with him); M/s Kek Ooi & Lee Hong

[Appeal from High Court, Pulau Pinang; Bankruptcy No: 29-416-94 & 29-452-94]

Reported by WA Sharif

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JUDGMENT

Abdul Malek Ahmad JCA:

There were two appeals before us but since they involved the same facts and issues and the same respondent, it was agreed at the outset that arguments b would be confined only to the first appeal but that the decision would bind the second appeal as well.

Forming the factual framework of these two appeals are the following agreed facts:

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(a) the appellants are the trustees of the estate of Oh Kee Lee @ Oh Phaik Sim, deceased;

(b) they were ordered on the 7th September 1991 to pay the respondent the costs in Penang High Court Civil Suit No. 315 of 1983 (hereinafter "the relevant suit");

d

(c) the costs of the said action were taxed on the 9th February 1994 at RM160,699.97 and an allocatur was issued to that effect;

(d) as the costs were not paid, bankruptcy notices were issued on the 18th May 1994 and the 8th June 1994 respectively against the appellants;

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(e) consequently, on the 23rd November 1994, creditor's petitions were issued against the appellants;

(f) receiving orders and adjudication orders were made against the appellants on the 26th April 1995;

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(g) notices of appeal against the receiving orders and adjudication orders were filed by the appellants on the 29th April 1995 to the judge in chambers;

(h) the said appeals were dismissed with costs on the 1st August 1995;

(i) a stay of all further proceedings was obtained on the 22nd August 1995 g pending further appeals.

For a full picture of the situation, the heading of the relevant suit was as follows:

IN THE HIGH COURT OF MALAYA AT PENANG

h

CIVIL SUIT NO. 315 OF 1983

BETWEEN

1. Oh Phaik Lin
2. Chor Saw Oon
3. Khoo Kay Hoe Trustees of the Estate of Oh Kee Lee @ Oh Phaik Sim, deceased ... Plaintiffs

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AND

1. Choong Lye Hock Estates Sdn Bhd
2. Chor Phaik Gnor
3. Chor Phaik Har ... Defendants

It is clear, therefore, that the appellants here were two of the three plaintiffs in the relevant suit while the respondent here was the third defendant.

Paragraph 6 of the relevant order dated 7 September 1991 reads:

> (6) the Plaintiffs be and are hereby at liberty to discontinue this suit pursuant to Order 21 rule 3 of the Rules of the High Court 1980 on terms that:
>
> (a) the Plaintiffs be and are hereby deprived of their right to bring a fresh action in order to give effect to the doctrine of *res judicata*;
>
> (b) the Plaintiffs pay to the 3rd Defendant the costs of this action (including this application) to be taxed;
>
> (c) there be an inquiry before the Senior Assistant Registrar to determine what damages (if any) was suffered by the 3rd Defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay;

Before arguments commenced, we had also allowed the respective motions by the respondent, as there were no objections from the appellants, for Tan Jiak Chye to be appointed as the duly constituted legal representative of the estate of the named respondent, who had passed away on 28 August 1997, for the purpose of these appeals as he had in fact been so appointed for the estate by the High Court on 17 November 1998.

Learned counsel for the appellants referred us to the English case of *Cartwright and Another v. Barker* [1975] 2 All ER 970 where the Chancery Division held:

> The appeal would be allowed and the bankruptcy notice set aside for the following reasons –
>
> (i) In the case of costs the effective judgment was the decree of the court itself ordering costs to be paid, and not the certificate quantifying costs. Accordingly the relevant judgment or order for the purposes of the bankruptcy notice was the order of 5th November 1970 and not the taxing master's certificate. It followed that the bankruptcy notice was not in accordance with the prescribed form nor in accordance with section 2 of the 1914 Act because it did not require the sum to be paid in accordance with the terms of the judgment or order.

(ii) The failure to comply with the bankruptcy notice was the act of bankruptcy on which all the rest was founded and unless the bankruptcy notice fulfilled the statutory requirements, it could not fairly be said that a debtor had committed an act of bankruptcy by not complying with it. Accordingly, although the debtors did not seem to have been misled in any way, in the circumstances it would not be a proper exercise of the court's discretion to overlook or to attempt to cure the shortcomings of the bankruptcy notice.

He also referred us to s. 3 of the Bankruptcy Act 1967 (hereinafter "the Act") which deals with acts of bankruptcy where para. (i) of sub-s. (1) provides as follows:

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Learned counsel then brought to our attention the relevant paragraph at p. II 63 of the *Bankruptcy Handbook* of the MLJ Handbook Series which state:

Final judgment or final order. An order or judgment, even on merits, liable to be varied on appeal cannot possibly be a final order or judgment (*Michael Kho Miang Haw v. Teo Siaw Kheng (f) & Anor* [1996] 2 BLJ 388. Where costs taxed was endorsed on the decree in the form of a certificate by the Assistant Registrar, it was held that as the matter was concluded by the terms of the local legislation, objection that no final decree drawn up was unfounded (*Re Looi Guan Kway, ex p Low Say Hooi* [1941] MLJ 228). However, it was held that an order for payment of costs was not a final judgment and therefore a bankruptcy notice could not be issued; see *Re Leo Hoon Hong, ex p the Municipal Commissioners of the Town and Port of Malacca* [1951] MLJ 222;

> *cf Re SE Menahem* [1952] MLJ 136, where it was held that a judgment for costs only would support a bankruptcy petition. In the case of costs, the effective judgment is the decree of the court itself ordering costs to be paid and not the certificate quantifying cost (allocatur) (*Haroun Al-Rashid, ex p Daya Leasing* [1996] 5 MLJ 317).

In one of the cases cited namely *Re Haroun Al-Rashid bin Mohd. Yusof, ex p Daya Leasing Sdn Bhd* [1996] 2 CLJ 516; [1996] 5 MLJ 317, it was held:

> It was apparent that there was only one final judgment dated 28 June 1988. The order dated 27 July 1988 was in respect of costs which was the decree of the court itself on 28 June 1988 ordering costs to be paid by the appellant. Therefore, in the case of costs, the effective judgment was the decree of the court on 28 June 1988 itself, and not the order dated 27 July 1988 quantifying the amount (see p 320D-F); *Re Chen Chong Fatt Willy, ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94 distinguished.

To conclude, learned counsel submitted that an allocatur is not an order of court nor a judgment and a bankruptcy notice cannot issue in respect of it. Thus the receiving orders and adjudication orders were not validly made.

The reply from the learned counsel for the respondent was that this was an interesting point with no decision at this level. The bankruptcy notice, he said, was founded on an allocatur. He stressed that the bankruptcy notice was valid notwithstanding the decision in *Cartwright's* case *(supra)*.

Even if there is a defect, he continued, the defect is formal and is curable under s. 131 of the Act which is reproduced below:

> 131. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

There was no application in any form, he emphasised, to resist the bankruptcy notice and for that reason, the appeals were distinguishable for the facts in *Cartwright's* case *(supra)* where such an application was made. It was clear from the headnotes in that case that the debtors had applied to the county court to set aside the bankruptcy notice but their application was dismissed.

Similarly, learned counsel further submitted, there was an application to set aside the bankruptcy notice in *Re Haroun's* case *(supra)*. He then cited the *Re Wheeler (a debtor)* [1982] 1 All ER 345 where it was held by the Court of Appeal that:

a The bankruptcy notice of 6 November 1980 complied with ss. 1(1)(g) and 2 of the 1914 Act because although on its face the notice referred to four orders, namely the order for costs in the action and the orders for costs in the three procedure summonses, those four orders had been channelled into the interim certificate issued on 24 October 1980 for £20,000 and had thereby become one order relating to one debt (for £20,000) made in one action, and b accordingly the bankruptcy notice did not refer to more than one order. Furthermore, the interim certificate issued on 24 October 1980 constituted 'a final order' for the purposes of ss. 1(1)(g) and 2 even though the inquiries ordered by the judge into damages and the profit if any obtained from a particular transaction had not been completed (see p. 348 g to j, p. 349 b, c p. 350 h j, p. 351 d e and j to p. 352 a and p. 353 f, post); *Re Alexander, ex p Alexander* [1892] 1 QB 216 applied; *Re Low, ex p Argentine Gold Fields Ltd* [1891] 1 QB 147 distinguished.

Learned counsel also reiterated that the relevant application was made in accordance with r. 18 of the Bankruptcy Rules 1969 and there was nothing d in the affidavits to challenge the bankruptcy notice.

In the Federal Court case of *Development & Commercial Bank Bhd. v. Datuk Ong Kian Seng* [1995] 3 CLJ 307; [1995] 2 MLJ 724, the relevant excerpt of the judgment state:

e Rule 18 of the Rules further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r. 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the f creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge g the validity of the bankruptcy notice.

That judgment had also made reference to the Privy Council case of *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 233 PC where a distinction had been drawn between a defect which renders the bankruptcy h proceedings a nullity and a mere formal defect or irregularity. The relevant excerpt reads:

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> But there is relevant authority upon the construction of the identical words in s. 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
>
> What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor ex p The Debtor v. Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. *Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.* (emphasis added.).

Before the learned judge in the court below, two issues were raised in the appeal against the decision of the learned Deputy Registrar. Apparently the first one, which was that the judgment debtors were not personally liable for the costs incurred, had been abandoned before us as this point was never raised.

The second issue was that the judgment debtors had not committed an act of bankruptcy within the meaning of para. (i) of sub-s. (1) of s. 3 of the Act as a bankruptcy notice could not be founded on an allocatur. On this point, this is what the learned High Court judge said:

> On the 2nd issue raised by the Judgment Debtor, Mr Tan argued that the Bankruptcy Notice dated 8.6.94 was based on the Allocatur dated 9.2.94, whereas, in his contention, an allocatur is not a final judgment or an order for costs. In support, he cited the case of *In Re Alexander; Ex Parte Alexander* [1892] 1 QB 216 CA.
>
> Counsel for Judgment Creditor argued that the order dated 7.9.91 is a final order as it granted leave to the Judgment Debtor to discontinue his actions *vide* Civil Suit No. 315 of 1983 against the Judgment Creditor on terms *inter alia* that: (a) Judgment Debtor do pay costs to the Judgment Creditor and for assessment of damages; and (b) the Judgment Debtor is debarred from bringing a fresh action – to give effect to the doctrine of *res judicata*. He referred to

paragraph 6 of the order of Court dated 7.9.91 in Civil Suit 315 of 1983 which states as follows:

(6) the Plaintiffs be and are hereby at liberty to discontinue this suit pursuant to Order 21 rule 3 of the Rules of the High Court 1980 on terms that:

a) the **Plaintiffs be** and are hereby **deprived of their right to bring a fresh action in order to give effect to the doctrine of *res judicata***;

b) the **Plaintiffs pay to the 3rd Defendant the costs of this action (including this application) to be taxed**;

c) there be an inquiry before the Senior Assistant Registrar to determine what damages (if any) was suffered by the 3rd Defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay;

In my judgment, the order of 7-9-91, is clearly – considering the peculiar words expressed therein – a final order granting leave to the Judgment Debtor to discontinue his actions, a *fortiori* as the order expressly debars the Judgment Debtor from bringing a fresh action. No other interpretation can be given to it, as it was further declared therein that any fresh action would run foul of the doctrine of *res judicata.* In my considered view, as the final order required costs to be taxed by the Registrar, the allocatur which bears the result of such taxation should rightly constitute part of and be read in conjunction with the final order of 7-9-91, which is crystal clear in its content. The Judgment Creditor is therefore entitled to commence bankruptcy proceedings against the Judgment Debtor based on the allocatur, which in any event, was submitted therein together with the final order of court dated 7/9/91.

Further, upon closer reading, *Re Alexander (supra)* cited by Mr Tan would appear to me to be in favour of the Judgment Creditor rather than his client; as therein it was held that as soon as an order for costs to be paid by the defendant had been taxed, the judgment therein was an absolutely final one, upon which the plaintiff was entitled to at once issue a bankruptcy notice against the defendant for the amount of taxed costs, by way of execution. I cannot see how the basis position *In Re Alexander* is dissimilar to the current case although Mr Tan had submitted that in the present case, something remained to be done (in the order of 7/9/91) by way of discontinuance of the case. I take this approach because of the finality of the terms in which the order of 7/9/91 had been worded. In any event, generally a successful defendant's costs are provable in the plaintiff's bankruptcy, provided that the verdict is obtained – or the judgment awarding costs is pronounced – prior to the date of adjudication or receiving order. (See *Williams and Muir Hunter The Law and Practice in Bankruptcy*, 19th Edition, page 156 and *Halsbury's Laws of England*, Volume 3, 4th Edition paragraph 724.)

Having considered the arguments on both sides, we were inclined to agree with learned counsel for the respondent and the learned High Court judge. We are faced with a situation here where the so called final judgment or order relates to the costs which form the basis of the consequent bankruptcy proceedings. But those costs are not quantified in that final order. This is followed by the allocatur where the quantification takes effect. In essence, the allocatur merges with the order for costs.

What follows are the bankruptcy proceedings to recover the judgment debt for costs. The appellants chose not to do anything at all to set aside those proceedings. Were they misled? We find that suggestion quite impossible since the number of the relevant suit is stated in all the relevant papers.

Would not they be liable to pay the costs stated in the allocatur? We hold that they would be and this attempt to say that bankruptcy proceedings cannot be based on an allocatur when no steps had been taken to set them aside merely denotes that if we were to agree with this technicality, the respondent would not have any recourse at all to recover the costs against the appellants despite the final judgment or order. This would render the final judgment or order meaningless.

We are further fortified in our reasoning by the words "or sum ordered to be paid" appearing twice in para. (i) of sub-s. (1) of s. 3 of the Act after the words "judgment debt". The first time they appear, they are qualified by the words "in accordance with the terms of the judgment or order". The allocatur, in our view, is in accordance with the terms of the judgment or order in the relevant suit.

Accordingly, we dismissed both appeals with costs. The deposits are to go to the respondent to account of their taxed costs.

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